Zurn Industries, Inc. *and* **Robert Pendergrass.** Case 19-CA-11731

April 6, 1981

DECISION AND ORDER

On July 16, 1980, Administrative Law Judge James M. Kennedy issued the attached Decision dismissing the complaint in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, requesting review of the record *de novo*. Respondent filed no cross-exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges that Respondent threatened its employees with discharge, and discharged six employees—Robert Pendergrass (the Charging Party), Everette Kissler (the union steward), Tony Wells, Steven Stedham, David Alexander, and Larry Jones, herein "the concrete crew—for their complaint about unsafe working conditions, in violation of Section 8(a)(1) of the National Labor Relations Act, as amended. The Administrative Law Judge recommended that the complaint be dismissed, finding first that Respondent made no threats, and second, that the concrete crew was dismissed for unsatisfactory work, not because of their complaints. We disagree.

Respondent is a construction contractor which, during the time in question, was building a cooling tower for a nuclear power plant in Satsop, Washington. The employees in question were laborers assigned at all relevant times to the concrete or "mud" crew, meaning that they poured concrete from a concrete truck into forms. There were a number of discrete tasks involved in this: Concrete was loaded from the truck into buckets, which were then emptied onto a chute directed to the forms and, as the concrete was poured into the forms, it was vibrated with machines called vibrators to prevent air pockets from forming and to prevent the concrete from separating.

Respondent, as required by Federal regulations and its contract with the site owner, held weekly safety meetings for employees on the site, usually conducted by its safety "supervisor," James Seaman. During the months of June, July, and August, Respondent's employees persistently demanded that Respondent furnish a "safety skip": a 4- by 4- by 8-foot box that could be attached to a crane and used to rescue injured workers from heights or excavations. Respondent initially furnished a wooden skip, which did not satisfy the employees because they thought it too weak. Respondent then furnished a steel skip, but the employees were still dissatisfied because the skip had no door, no litter, and no first aid kit. After the second skip arrived, it was discussed at an August 15 safety meeting of all Respondent's employees at the site. When this discussion became heated, Respondent's site superintendent, Kester Buffington, interrupted the meeting and said that he was "tired of hearing about safety and especially about the safety skip," that anyone with any complaint should talk to the steward about it, and that if anyone did not like that procedure there would be two checks waiting for him in the office, meaning they were discharged. When Buffington had spoken, the meeting broke up.

Immediately after this meeting, the concrete crew went to the site of that day's "pour," where they found that the forms were not yet complete. Specifically, ladders and handrails were not in place and at least one metal bar called a rebar was not capped. The crew concluded that the job was not safe, and called this to the attention of Seaman. Seaman, who did not have authority to stop work, went to find the safety supervisor for Ebasco, a construction management contractor overseeing the entire project. While Seaman was gone, the concrete crew decided among themselves that they would not work on the pour until they were sure it was safe. While waiting, they were observed by Superintendent Buffington and Ray Lewis, a quality control supervisor for Ebasco. Lewis approached them and told them that Buffington wanted them to begin work; they responded that they were not going to work until they heard from the Ebasco safety man. The Ebasco safety supervisor agreed that the forms were unsafe, and the pour was delayed several hours.

Two days later, on August 17, the forms were removed from the August 15 pour, revealing numerous serious defects. That afternoon, the six members of the August 15 concrete crew were discharged. When they learned of their discharge, they confronted Buffington in his office. Buffington told them that they were being fired because of the poor results of the August 15 pour, which Buffington said were due to poor vibration. Two of the six, Stedham and Wells, objected, saying that they had not been engaged in work related to vibration on the August 15 pour.

In dismissing the complaint, the Administrative Law Judge concluded that "the only probable scenario" was that the six-man concrete crew was discharged because of the poor results of the August 15 pour. He also concluded that Buffington did not threaten discharge for complaining about safety when he spoke to the safety meeting on the morn-

ing of August 15. We disagree with these conclusions.

During the August 15 safety meeting Buffington came out of his office adjacent to the meeting place and spoke in an "annoyed" tone. In pertinent part, Buffington said:

> We are tired of hearing all this commotion about safety and . . . about this safety skip. We have a skip now and if anybody doesn't like it we have checks for them.

The Administrative Law Judge termed these remarks "totally understandable" in the circumstances.[1] He noted that Respondent had already "complied" with employee requests for a skip, and that one employee at the safety meeting had said, "To hell with the way management wants that skip, we need it for safety, it's the way we want it, not the way they want it." This remark the Administrative Law Judge termed an "insubordinate seizure of safety authority." However, an employee is not insubordinate to express an opinion on occupational safety—one of the most imporfant conditions of employment. Nor does this expression lose its Section 7 protection because it may have been intemperate. See *Fall River Savings Bank*, 247 NLRB 631, fn. 3 (1980); *American Telephone & Telegraph Co.*, 211 NLRB 782, 783 (1974); *Houston Shell and Concrete Co., A Division of McDonough Co.*, 193 NLRB 1123, 1129 (1971).

The Administrative Law Judge further found that Buffington was, in any case, merely telling employees to direct their complaints through proper channels. But weekly safety meetings were proper channels, and the crew's action later that day regarding the unsafe forms was also directed through proper channels: Steward Kissler, Seaman, and the Ebasco safety supervisor. We conclude that Buffington, by his remarks at the safety meeting, threatened employees with discharge for engaging in concerted activity for their mutual aid or protection, a right guaranteed by Section 7, and thus violated Section 8(a)(1) of the Act.

Concerning the discharge of the concrete crew, the Administrative Law Judge concluded that it was not motivated by the safety concern voiced by the crew at the August 15 pour site, hence there was no violation of the employees' Section 7 rights. The Board has recently stated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), that where the motivation for discharge is at issue, the General Counsel must make a *prima facie* showing sufficient to support an inference that protected activity by employees was a motivating factor in an employer's decision to discharge. The employer then has the burden of showing that the employees would have been discharged absent that protected activity.

Contrary to the Administrative Law Judge, we find that the General Counsel has made a *prima facie* showing. The Administrative Law Judge found improbable the fact that Buffington, at the August 17 discharge confrontation, said that there had been too much "commotion" about safety from the concrete crew, because the only "commotion" about safety occurred at the recent weekly safety meeting. The Administrative Law Judge further found that, in any case, the impact of the crew's refusal to work until the site was approved safe to work was "submerged" by the fact that concrete could not have been placed until the forms were finished. We find the Administrative Law Judge's treatment of the testimony on these matters speculative and do not adopt it.

Respondent's exhibits show the "15 Aug '79" pour was originally scheduled for "8:30," Stedham testified that it was "rescheduled at 10 the first time" and Pendergrass testified that the pour was actually started that afternoon about 1 o'clock. Buffington, though knowing the forms were unfinished, ordered the concrete crew to proceed. The crew contacted Seaman to protest the unsafe conditions created by the incomplete form, and Seaman in turn contacted the Ebasco representative. As a result, the crew was sent to an early lunch while handrails were being provided.[2]

We further find that Buffington was clearly aware of these developments[3] and, contrary to the

[1] The Administrative Law Judge found that Buffington's remarks that morning were addressed only to complaints about the safety skip, not to safety generally, and that the contrary recollections of several witnesses were "exaggerations." The record testimony does not support that conclusion. In addition, either version would establish Buffington's hostility to employee complaints at that time. Buffington testified only as an adverse witness for the General Counsel. He was not recalled to deny any of the subsequent testimony. Unlike the Administrative Law Judge, we draw an adverse inference from the lack of a specific denial. See *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, fn. 1 (1977).

[2] The Administrative Law Judge concluded that, while the crewmembers were prepared to refuse to work, they were not "forced to refuse" to work on the forms and therefore did not refuse to do so. Be that as it may, what is important is that the crew initiated the delay of work.

[3] Buffington was aware that the concrete crew had refused to do the pour, and he testified that the refusal occurred "awfully close to noon I would imagine. I know it was a good 45 minutes or getting close to an hour from what the scheduled pour was to have been made . . . ." Later, the Administrative Law Judge asked Buffington the sequence of events on August 15 with respect to the forms for the pour, to which Buffington answered:

> The first that it was brought to my attention, and somebody came to me, I don't know who, but possibly one of the foremen, possibly Jim Seaman, and said the pour crew isn't going to get on there without a handrail . . . . I immediately went to Vernon Lee, the carpenter foreman, and explained we were going to have to have handrails on there . . . . The first time I was aware there was any controversy on handrails was now. I guess there was more I didn't get involved

Continued

Administrative Law Judge, find nothing improbable in the employees' testimony that Buffington, at the time of discharge, mentioned "commotion" about safety as the cause of the crew's discharge. In reaching this result we note that the Administrative Law Judge referred to employee Wells' testimony, which he considered "closest" to the truth, as "not describ[ing] anything like Buffington's supposed admission" as reported by Stedham, Pendergrass, and Jones. However, Wells' testimony on this point clearly indicates that Buffington referred to the crew's complaints as a basis for the discharge and in fact is quite similar to that of Stedham, Pendergrass, and Jones, all of whom were sequestered at the hearing.[4] Thus, Wells, in response to the General Counsel's question whether he had heard anyting regarding complaints during the discussion between Stedham and Buffington:

> Mr. Buffington had stated to Steve Stedham that the higher up offices have been hearing complaints from the concrete crew and that he was told to fire the whole crew.

Stedham, protesting his discharge to Buffington because he did not run a vibrator, was told by Buffington:

> He said it came from above . . . he had been hearing too much commotion about safety from the crew and that he and Stamp thought they could do better with a whole new crew. And I said that it wasn't the crew it was the way Mr. Buffington scheduled pours way ahead of time, and the equipment they had, which was lousy, they'd need more than a whole new crew.

Pendergrass, who heard Buffington respond to Stedham when he protested that he did not even run a vibrator:

> And Kester [Buffington] said, "Well, we have been hearing a lot of commotion from the concrete crew about safety and it came down from George [Stamp] to get rid of all of you and so I did."

Jones, concerning what Buffington said to him and Steve Stedham when they protested that they weren't using the vibrators:

> Well, you've got me, the reason you were fired is because you were complaining about safety, and people above my head found out about it. And I had to let you go.

The Administrative Law Judge, in countering the obvious problem of Buffington's lack of denial of the testimony quoted above,[5] made a passing reference to "considerations of demeanor and fervor" and then concluded that Pendergrass and Stedham—whom he was not discrediting on the basis of "deliberate prevarication"—appeared to him as "excessively sensitive to the safety skip matter," as "aware of the agreement not to work on August 15 and . . . ready to ascribe an evil motive to nearly anything negative which occurred." He added that Jones was "even worse" in this regard,[6] and concluded: "That Buffington ever uttered such an admission is most doubtful."

The Administrative Law Judge seems to have confused demeanor with fervor for safe working conditions and, based on his own speculation in that regard, has excused the failure of Respondent to question Buffington. On this record we are not prepared to conclude that the employees' concern about safety—either as to the skip or the handrails—was excessive, or that their undenied testimony was not credible. The credibility findings we make comport with the record evidence and with the inferences fairly drawn therefrom. See *El Rancho Market*, 235 NLRB 468, 470 (1978). We therefore find that Buffington indicated, during his August 17 discussion with the discharged employees, that they were discharged because of their complaints about safety.

Having concluded that General Counsel has made a *prima facie* showing that the motive of Respondent in discharging the crew was its activity in complaining about safety with respect to the handrails, we turn to Respondent's burden of showing that it would have discharged the crew absent the crew's protected request to provide safety.

Although each crewmember received an identical termination slip, stating, "Does not do work to our satisfaction," Respondent advanced conflicting explanations of the discharges, before and during the hearing. Stamp testified that he ordered Buffington to fire the crew; while Buffington agreed with that account at the hearing,[7] he had said in a pretrial affidavit that he decided to discharge the crew without even consulting Stamp. At different times Buffington and Stamp cited different pours as the cause of the discharges, including those of

in, and then they came to me and said they weren't going to get on there . . . ."

[4] By contrast, the site superintendent, Buffington, had been in the courtroom during the testimony of Project Manager Stamp. These two were the first witnesses called by the General Counsel as adverse witnesses. See Fed. R. Evid. 615; *Unga Painting Corporation*, 237 NLRB 1306, 1311 (1978).

[5] See fn. 1, above.

[6] We cannot agree that Jones' testimony showed "bias on its face." Rather it suggests that Jones wanted to hear Buffington admit that he was discharging the crew for their complaints, as Jones knew his rights and was prepared to enforce them. (See ALJD, sec. III,C.)

[7] See fn. 4, above.

August 3, 12, 15, 16, and 17. In his affidavit, Buffington said the discharges were based "solely" on the August 16 pour. Some of these pours included employees who were not discharged, and the results of the last two were not yet known on August 17, the date of discharge. Though Stamp claims to have observed improper work by the crew, he admits they were not warned. Respondent's inconsistency leads us to draw an unfavorable inference against it for inability to settle upon an explanation for the discharge of the crew. See *A. J. Krajewski Manufacturing Co., Inc.* v. *N.L.R.B.*, 413 F.2d 673, 675 (1st Cir. 1969), where the court noted "especially the Company's inability to adhere with consistency to any explanation of its action"; also *N.L.R.B.* v. *Teknor-Apex Company*, 468 F.2d 692, 694 (1st Cir. 1972).

As earlier noted, the Administrative Law Judge concluded that the only "probable scenario" was that the crew was discharged on August 17 because of the results of the August 15 pour. However, the Administrative Law Judge also found—and the record clearly supports the facts—that although vibration of concrete is necessary to a satisfactory pour, two of the three vibrators used by the crew were not functioning on August 15, and Respondent thereafter was forced to purchase replacements.[8] Respondent knew that the vibrators were not functioning properly, but nevertheless continued the pour. In addition, the entire crew of six was discharged, though only two of them operated vibrating equipment on that pour, and the foreman who supervised and worked with the crew was not discharged or even reprimanded.[9] We further note that the record contains evidence that the concrete crew's work was generally satisfactory. Under these circumstances, we find that Respondent's asserted reason for the discharges was a pretext.

On this record, the discharge of the entire crew flowed from the crew's specific safety complaints of August 15 and the accompanying protest and delay of work, concerted activity protected by Section 7 of the Act, which we find were the true causes of the discharges. Accordingly, we find and conclude that Respondent has violated Section 8(a)(1) of the Act.

[8] Ebasco's report on the August 15 pour (Pour 8B) notes that the defects were typical of pours where the concrete falls too far, which it did on August 15 because the tremie chute was broken.

[9] The Administrative Law Judge concludes his Decision by noting a grievance settlement several weeks later: One crewmember was rehired and the rest were judged suitable for rehire; he finds that the employees' union thereby admitted some "fault" on the employees' part, and that Respondent admitted some "unfairness" on its part. The Administrative Law Judge thus implies that this settlement is evidence that Respondent did not violate the Act. We cannot agree.

CONCLUSIONS OF LAW

1. Zurn Industries, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Laborers Local No. 374, affiliated with the Washington and Northern Idaho District Council of Laborers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to discharge employees for voicing their opinions concerning job safety issues, Zurn Industries, Inc., violated Section 8(a)(1) of the Act.

4. By discharging employees Robert Pendergrass, Everett Kissler, Steven Stedham, Tony Wells, Larry Jones, and David Alexander on August 17, 1979, Zurn Industries, Inc., violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Zurn Industries, Inc., engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order Respondent to cease and desist therefrom and from engaging in like or related conduct, and to take certain affirmative action to effectuate the policies of the Act.

Respondent shall be ordered to offer Robert Pendergrass, Everett Kissler, Steven Stedham, Tony Wells, Larry Jones, and David Alexander immediate reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of earnings or other benefits they may have suffered by reason of their unlawful discharges. Backpay and interest thereon shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[10]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent,

[10] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would compute interest on the backpay in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

Zurn Industries, Inc., Elma, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees for engaging in concerted activity for their mutual aid or protection, by expressing their concerns for safe working conditions, either in weekly safety meetings, or at other reasonable times and places.

(b) Threatening its employees with discharge for engaging in concerted activity for mutual aid or protection by expressing concern for safe working conditions.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Offer Robert Pendergrass, Everett Kissler, Steven Stedham, Tony Wells, Larry Jones, and David Alexander immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings or other benefits they may have suffered as a result by paying them a sum equal to what they would have earned absent the unfair labor practice, less any net interim earnings, plus interest.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at the Satsop, Washington, site of Zurn Industries, Inc., copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by an authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Realtions Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

YOU HAVE THE RIGHT, under the National Labor Relations Act, as amended, to act together on your concern for safe working conditions, and in other respects for your mutual aid or protection.

The National Labor Relations Board has found, after a hearing, that we violated the National Labor Relations Act by threatening our employees with discharge for complaining about safety conditions at their worksite, and by discharging Robert Pendergrass, Everett Kissler, Steven Stedham, Tony Wells, Larry Jones, and David Alexander on August 17, 1980.

We hereby notify our employees that:

WE WILL NOT discharge employees for expressing their concerns for safe working conditions in weekly safety meetings or at reasonable times and places.

WE WILL NOT threaten any employee with discharge for expressing concern about safe working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to Robert Pendergrass, Everett Kissler, Steven Stedham, Tony Wells, Larry Jones, and David Alexander to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL make whole Pendergrass, Kissler, Stedham, Wells, Jones, and Alexander for any loss of earnings or other benefits each may have suffered from the time of discharge to the time of reinstatement, less net earnings during that period, plus interest.

ZURN INDUSTRIES, INC.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: This case was heard before me at Seattle, Washington, on

February 14 and 15, 1980, pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 19 on October 25, 1979,[1] and which is based on a charge filed by Robert Pendergrass, an individual, on September 4. The complaint alleges that Zurn Industries, Inc. (herein called Respondent), has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act).

Issues

Whether or not Respondent on August 17 discharged its entire concrete placement crew because some of its members had engaged in or had threatened to engage in a work stoppage over safety matters and whether the discharge had been preceded by a threat to discharge employees over safety complaints.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. RESPONDENT'S BUSINESS

Respondent admits it is a Pennsylvania corporation engaged in the engineering and construction business and having an office located in Elma, Washington, and a jobsite in nearby Satsop. It further admits that during the past year, in the course and conduct of its business it has purchased and received goods and materials valued in excess of $50,000 from suppliers outside Washington State. Accordingly, it admits, and I find, it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and I find, that Laborers Local No. 374, affiliated with the Washington and Northern Idaho District Council of Laborers, AFL-CIO (herein called the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Participants*

Respondent has contracted with the Washington Public Power Supply System (WPPSS) to design and construct the cooling towers for a nuclear power plant located near Satsop, Washington. Other portions of the plant are being constructed by other firms and all of the construction companies are under the direction of Ebasco Services, Inc., which has a contract with WPPSS to oversee all construction. Ebasco is the construction manager and performs the site's necessary administrative functions.

Respondent has recognized the Union as the representative of its laborers and has recognized other craft unions as well, including a local of the Ironworkers Union. At the time in question, Respondent employed between 80 and 100 employees, including approximately 20 to 25 laborers. Of these approximately 6 were assigned to the concrete placement crew, commonly called the "mud crew."

Respondent's hierarchy from the bottom up is: Don Scott, mud crew foreman; Henry Chavie, laborer foreman; Kester Buffington, field superintendent; and George Stamp, project manager. Stamp was the highest official present at the site and reported to Respondent's Tampa, Florida, headquarters. Others who reported directly to Stamp were Respondent's safety supervisor, James Seaman, and members of Respondent's quality control department.

The mud crew regularly consisted of Pendergrass, Everett Kissler, the union steward, David Alexander, Tony Wells, Larry Jones, and Steven Stedham.

At the time of the transactions to be described herein, August 1979, Respondent was in the process of placing concrete for the water inlet trench and the foundation of the cooling tower, which will eventually rise to the height of 495 feet. The foundation ring is approximately 420 feet in diameter. The water inlet joins the tower at a "header," which is a large concrete platform containing a tunnel for the hot water. In addition to serving as the header for the inlet, the platform was also to serve as the base for the tower crane to be used during construction. It is fair to say, and no party disagrees, that the quality of the concrete work to be performed at this stage of construction must meet the design specifications: if not, the structural integrity of the crane base and surrounding foundations would be jeopardized.

During the course of construction, and pursuant to its agreement with WPPSS, Respondent holds weekly safety meetings with its crews. All meetings occur on Wednesdays before beginning work: during a month three meetings are limited to each individual craft, while one is an all-craft meeting.

One of the topics which had heen regularly discussed at the safety meetings was the need for a "safety skip."[2] The witnesses are all in agreement that Respondent was not obligated by safety rules or regulations—whether promulgated by state or Federal safety agencies—to provide such a device. Nonetheless, it appears that on large construction projects such as this safety skips are common. Indeed, Ebasco Services had a standard design for one. As a result of safety meeting requests which had begun in May, Respondent built a wooden skip. However, because it was not constructed of steel, like Ebasco's design, many employees did not trust it, believing it not strong enough. It was approximately 4 by 4 by 8 feet,

[1] All dates herein refer to 1979, unless otherwise indicated.

[2] Some of the witnesses referred to it as a "safety 'skiff'" as do the General Counsel and the transcript. However, it is clear that the proper name of the instrument is "skip"—a basket or a bucket for carrying men, here injured men. See *Webster's Third New International Dictionary* (1963).

and contained an entry door. As a result of the additional complaints, Respondent ordered a steel skip to be constructed in Centralia, Washington. It arrived in mid-August, shortly before the safety meeting of August 15. Although it was approximately the same size as the wooden skip, it did not contain a door, and there was testimony that some employees thought its use would not be limited to rescue purposes.

B. *The Safety Meeting of August 15*

At 8 a.m. on August 15, an all-craft safety meeting was begun under the leadership of Safety Supervisor Jim Seaman. He testified that the meeting was not specifically aimed at the safety skip, and that it started out with a discussion of some minor complaints, such as a lack of band-aids and torn gloves. At some point, he said that he had heard the new skip was on the way and it would not be very long before it arrived. Pendergrass remembers an ironworker asked for details about the safety skip, and Seaman replied it had arrived but he had not seen it yet. Another ironworker said it was only a metal box and did not qualify as a safety skip. Tony Wells remembered Seaman discussing the skip with an ironworker and their discussion dealt with whether or not it met OSHA standards. Steve Stedham testified that during the meeting Seaman announced that Respondent had a safety skip, saying, "I know that you men don't like it, but that's the way the Company wants it." At this point, according to Stedham, an ironworker "spouted out" saying, "To hell with the way management wants that skip, we need it for safety, it's the way we want it, not the way they want it."

Everyone is in agreement that, during the discussion regarding the skip, Field Superintendent Kester Buffington came out of his office, which was adjacent to the meeting place, and spoke to the group in an annoyed tone.

Pendergrass testified that Buffington stepped out in front of Seaman and said, "We are tired of hearing all this commotion about safety and especially about this safety skip. We have a skip now and if anybody doesn't like it we have checks for them. We have a procedure around [here]. You talk to your steward, your steward talks to your business agent, and your business agent talks to me. If you don't like that we have checks for you, too." Despite this alleged statement, Pendergrass and others conceded that at company safety meetings Respondent encouraged employees to make suggestions and comments. Pendergrass found Seaman "responsive and very amiable" whenever employees made safety suggestions to him.

About this incident, Kissler testified that Buffington "commented on he'd heard enough about the safety skip and that what they had was what the Company was going to provide for us. [Buffington] said if we didn't like the procedure the Company was taking, that anyone that didn't like it could pick up their check and head down the road." Wells testified that Buffington interrupted Seaman. Wells recalled, "[Buffington said] he had heard enough about the safety skip, that he's been hearing complaints about it for the last month, and that he was sick and tired of hearing it, that there was procedures, proper channels, that you were to go through when you had a safety complaint, and that if he heard any more from anybody else about the safety skip, that if they didn't like the way the project was run, they could go pick up their checks at the window." Stedham testified that, after hearing the ironworker speak angrily of the skip, Buffington pointed his finger at the man and said, "I'm damn tired of hearing about safety, especially the safety skip. I don't want to hear no more about it: if you guys don't like the way things are run around here, I'll get you both your checks and you can go down the damn road."

Seaman recalled Buffington saying he was tired of hearing so much about the safety skip and, if the employees did not agree with the way things were going, there were two checks waiting for them in the office. He denies Buffington saying anything about safety complaints generally. He remembers that during the meeting there was a "lot of rhetoric"—a conclusionary statement which I believe to be accurate if it is taken to mean that angry tones were used by those employees who wanted a different style skip.

The General Counsel did not ask Jones for his recollection, although he was no doubt present, being scheduled to work shortly as a vibrator man. Neither did the General Counsel ask Buffington for his version when he was called as an adverse witness.

After listening to the versions of the mud crew members as they testified about Buffington's remarks at the safety meeting, I found myself totally unimpressed with the likelihood that Buffington made an unlawful statement. It is apparent, particularly from Stedham, that some members of the ironworker crew were quite angry and at least one of them told Seaman that safety matters were solely the concern of employees, not the concern of the employer and that it was the workmen's right to dictate safety terms to Respondent. Clearly, that attitude was insubordinate and an attempt to undermine managerial authority. Moreover, the safety skip matter had been before Buffington since May and had been resolved, not once, but twice. Respondent had first built the wooden skip which had been on the job since June. When employees complained it was not strong enough, Buffington caused another to be built and its imminent arrival had just been announced by Seaman. Thus, from Buffington's standpoint he had complied with two employee requests for a skip and believed the problem to be over. In that context his response that he was "sick and tired of hearing about the safety skip" is totally understandable, particularly where it was being exacerbated by an employee's insubordinate seizure of safety authority. In essence, Buffington stated that he was no longer going to entertain direct employee complaints about the skip, but would entertain them if they were brought to him through the proper channels, the various union grievance procedures. And, his remark, that people could quit if they did not like the way the Company operated, was simply a response to the ironworker's insubordination. In no way was it a threat to discharge employees for making safety related complaints. Thus, I conclude, from analyzing the testimony of the General Counsel's own

witnesses, that the General Counsel did not make out a *prima facie* case with respect to Buffington's alleged threat to discharge employees for engaging in the protected activity of making safety complaints or speaking of safety matters. Supporting this conclusion is the employees' own testimony that Respondent encouraged safety discussions and responded favorably to legitimate concerns. Their recollection that Buffington's remarks encompassed safety matters beyond the skip are exaggerations and are not credited.

C. *The Discharge of the Mud Crew*

Immediately after the safety meeting ended on August 15, the mud crew headed down to begin work on pour number 8–B, the inlet header crane base. When they arrived, they observed that the form was not finished and the carpenter and ironworker crews were still working on it. From the drawings, it appears that the concrete for that day was to begin at ground level and rise to approximately 15 feet, the height of the form when finished. Because it had not yet been finished, the form lacked handrails, some of the ladders had not been placed and vertical rebar had not been capped. The crew, particularly Steward Kissler, decided it was not a safe workplace. A cement truck had already arrived and the pour was scheduled to begin at 9 a.m. Nonetheless, the crew decided to check with Safety Supervisor Jim Seaman, regarding whether or not work should begin. Both Steward Kissler and Larry Jones saw Seaman nearby and spoke to him about it. Seaman looked the pour over, apparently concluded that the unfinished forms raised a safety question, and told them he would discuss it with Ebasco's safety personnel. He left to do that. In the meantime, the crew decided among themselves that they would not work until the handrails were up. While they awaited Seaman's return, they observed Buffington on the ring wall with Ray Lewis, a quality control man. While they waited Lewis came down and told them Buffington wanted them to begin the pour. Wells told him that he was not going to begin because it was not safe, and Lewis told him "go ahead and swing the bucket out anyway. . . ." According to Pendergrass and Stedham, Wells refused to do so. Wells himself said that he simply told Mud Crew Foreman Don Scott "that we could not start the pour until we heard word from the safety man on whether or not it was safe." At approximately 11:30, according to Stedham,[3] Seaman told them the pour was not to begin until the rails were up. As a result the crew took an early lunch. When they returned at approximately 1 p.m., the guard rails had been installed in at least one section of the form and they began to pour.

At this point it should be observed that Project Manager Stamp and Buffington both testified without contradiction that this particular pour was delayed for three reasons: (1) the forms were not ready, (2) the reinforcing iron was not ready, and (3) the iron inserts (anchors) were not installed. Stamp testified that the pour was delayed pursuant to a joint decision of Ebasco Services, Buffington, and Seaman. He admits he understood that it was the Laborer steward who had raised the handrail issue. He also concedes that the first load of concrete was lost and that a certain amount of overtime was required later that day to make up for the delay. He minimized the latter observation by saying that even without the delay some overtime would have been required anyway. Stamp also testified that he did not blame the mud crew for the lost concrete, but on the fact that the forms were not ready.[4]

The General Counsel argues from this scenario that I should conclude that the mud crew had engaged in a protected work stoppage to await the correction of certain safety matters and that the discharge which followed 2 days later was principally motivated by it. I have no difficulty in concluding that the mud crew members concluded among themselves that they would not work on this particular pour until the handrails were installed, the rebar capped, and the ladders in place. Nonetheless, it appears to me that nothing out of the ordinary occurred. Steward Kissler, following the proper procedure, pointed out the safety question to the safety supervisor, who went to the project overseer, Ebasco. At the same time, it is also clear that the forms were not complete. All witnesses are in agreement that the ironworkers and carpenters were still constructing the forms, and commonsense can only lead to the conclusion that if the forms were not ready for concrete, concrete could not be poured. The reason the rails and ladders were not set was because the forms were not finished. The rails are the last thing to be installed and the form would not be completed until they were. But aside from that, the absence of finished reinforcing iron and inserts further dictated that the pour not begin.

Thus, even though the mud crew did not want to work on those forms, it does not appear that they were ever forced to refuse. They were prepared to do so, but did not have to, and therefore did not. After Ebasco's and Respondent's management consulted with one another, the crew was sent to an early lunch to await completion of the forms. Finally, I observe that even though the crew made a decision not to go to work until the safety matters were corrected, there is no credible evidence that Respondent was aware of that decision. It is true that Pendergrass and Stedham thought that Jones had refused Lewis' request to go to work, but it does not even appear that Jones spoke to Lewis. Instead he spoke to Scott, and no one has shown Scott to have done anything but remain silent while Seaman spoke with Ebasco. Accordingly, I am unimpressed with the General Counsel's evidence that either Buffington or Stamp was aware of the crew's decision. Even if they were, there is no evidence that they believed the crew's concern caused the delay. The delay was solely attributable to the fact that the forms were not ready for concrete. In addition, they knew that the union steward's safety concern was legitimate.

[3] It seems unlikely that it would have taken Seaman from 9 to 11:30 a.m. to tell them the pour was to be delayed. I believe Stedham's testimony to be an exaggeration. The delay was probably no more than 15 minutes, for the Ebasco safety people were nearby.

[4] On a project this size one load of lost concrete is no doubt a very minor expense.

The pour of August 15, having started on an inauspicious note, continued to sour. During the pour, two of the three vibrators broke and the tremie chute (a chute attached to the crane-borne bucket which keeps the mixed concrete from separating while falling) all broke, leaving vibrator man Wells to do the work of two men and permitting the aggregate to separate on impact. The job was also hampered to some extent by the fact that portions of the form were still being worked on by the ironworkers and carpenters, though, frankly, I doubt the testimony to the effect that the other crafts interfered significantly. It appears that those crafts were working at some distance from the pour on other sections of the form.

On August 16 another pour was made, which required concrete to be placed against a 45-degree hillside. A certain amount of difficulty was encountered with that pour, and there is conflicting testimony with respect to whether or not the vibrators were working properly. I do not deem it necessary to resolve that conflict, though the work is said to have had some bearing on the crew's discharge the following day. Nonetheless, vibratormen were seen on that occasion attempting to move concrete laterally with the vibrator, an unacceptable practice as it tends to break up the aggregate and causes it to be uneven, thereby affecting its strength.

On the morning of Friday, August 17, the forms for the August 15 pour were removed, revealing for the first time serious deficiencies in the quality of the pour. The north face of the header on that pour was most deficient, containing numerous rock pockets and voids. (See Resp. Exh. 4, pp. 2 and 4, diagrams for the repair order.) One void was so bad it actually created a hole through the entire wall. (See Resp. Exh. 7, bottom photo, where to demonstrate the void a reinforcing bar was inserted through the entire foundation.) Needless to say, both Respondent's quality control people as well as those of WPPSS were quite alarmed by the poor quality of work. Respondent's quality control office informed Stamp immediately. On that day, WPPSS wrote a complaint letter to Respondent, though it was not received for several days.

Respondent's project manager, Stamp, testified that on learning of the workmanship he decided to discharge the entire mud crew. He had had doubts about the quality of work being performed by the crew since an August 3 pour and had had a number of conversations with Buffington about its members.[5] Both Stamp and Buffington agree that they had discussed certain instances involving some members of the mud crew who had expressed reluctance to do other work when pours were not scheduled. While the evidence supporting their conclusions is not totally clear, Stedham admitted conduct quite similar while explaining the difficulties the mud crew encountered on the August 15 pour. Stedham is an experienced concrete worker and considered to be a good vibrator man. Before becoming the leadman and operating the truck chute, as he did on August 15, he had been a vibrator man. When an operable vibrator was obtained to replace one of the broken ones on August 15, Laborer Foreman Chavie asked Stedham to run it. Chavie's request was no doubt reasonable, considering the fact that the other vibrator man, Alexander, was inexperienced and was doing noticeably poor work. Nonetheless, Stedham admittedly refused. That refusal lends credence to Stamp's and Buffington's testimony that mud crew members were reluctant to perform jobs other than their own.

Both Stamp and Buffington testified that the decision to discharge the mud crew was solely made by Stamp on August 17. In addition, at the confrontation which occurred that afternoon, Buffington told the crew that the decision had been made by his superior, which could only mean Stamp.[6]

At approximately 3:30 p.m., the concrete crew members received termination notices. Each slip contained a checkmark in the box marked "does not work to our satisfaction."[7] Pendergrass asked Chavie, who had delivered his slip, what the underlying reason for the discharge was. Chavie replied that he had been told "poor vibration." Pendergrass and those other members of the crew who had not worked as vibratormen were incensed. While they agreed that the poor vibration work had occurred on August 15, they did not believe they should be blamed for it, principally because they had not operated the vibrators; second, because they believed that the poor vibration was in large part due to Respondent's failure to supply the vibratormen with operable equipment; and third, because they knew Respondent was aware of Alexander's inexperience.

Although the crew did not descend on Buffington in his office *en masse*, nonetheless within a matter of minutes the entire crew was either in Buffington's office or in the doorway. All, with the possible exception of Alexander, were in earshot. The first to arrive, and the most vocal, was Stedham. Stedham admits yelling at Buffington and demanding to know why the entire crew was being fired. Buffington responded that the crew had not worked to his satisfaction and had engaged in "poor vibration." Stedham shouted he had not run a vibrator and Buffington said, "It came from above, that we've been hearing too much commotion about safety and the poor vibration was not the only reason, but he had been hearing too much commotion about safety from the crew and that he and Stamp thought they could do better with a whole new crew." Stedham responded it was not the crew's fault; that it was the way Buffington scheduled pours and the lousy equipment. Stedham offered "to kick his ass" because he thought Buffington was a slob. Kissler intervened saying to Stedham that he was wasting his time. Stedham, however, continued shouting and

[5] Resp. Exh. 5 contains three photographs (two of the same error) with respect to the August 3 pour.

[6] It is true that in his second affidavit Buffington says he was the sole person to make the decision and did not consult Stamp. Nonetheless, in view of statements attributed to him at the confrontation, which are consistent with his testimony before me, I conclude his testimony is the more accurate.

[7] All six were also listed as "ineligible for rehire." A stipulation of the parties shows that at a grievance settlement meeting on August 31, Kissler was reinstated as of September 4 without backpay, and the remaining termination slips were modified to show the others were eligible for rehire.

admits calling Buffington a "chickenshit," an "asshole," a "mother fucker," and an "unfit supervisor." Stedham says Buffington used similar language in return.

Pendergrass testified that he could hear Stedham yelling before he even arrived and heard Stedham complaining that he did not run a vibrator, but "busted buckets" to which Buffington replied, "Well, we've been hearing a lot of commotion from the concrete crew about safety and it came down from George [Stamp] to get rid of you all and so I did."

Tony Wells testified that he heard Stedham ask Buffington why he was fired. Buffington replied he was fired for "unsatisfactory work." When Stedham asked what was unsatisfactory, Buffington said that "there was poor vibration on the concrete crew and that he had received word from higher up in the office to fire the whole crew." After the General Counsel suggested the topic of safety and some byplay among counsel and myself, the General Counsel asked Wells the following:

> Q. (By Mr. Brennan) Would you please tell us what was said and by whom, regarding complaints?
>
> A. Mr. Buffington had stated to Steve Stedham that the higher up offices had been hearing complaints from the concrete crew and that he was told to fire the whole crew.
>
> Q. Do you recall if he said what those complaints were about?
>
> A. About the project site, about the safety skip that was—that they said was right for the job site and just general complaints.

Larry Jones testified that he heard Stedham ask Buffington, "Kester, what the hell is this? You can't fire me for this." Buffington replied, "Well, that's one of the reasons why I fired you, is your attitude." Jones interrupted saying, "No, you can't tell us its our attitude, now why did you fire us?" Jones says Buffington looked at him and then at Stedham and said, "Well, you don't expect me to keep you on the job with a pour like that. Look at that pour," referring to the August 15 job. Both explained that the vibrators were broken and Stedham said, "Goddamn it Kester, I wasn't even on that pour, I was running the chute." Jones chimed in saying, "Damn it, Kester, I wasn't even on that pour either, I was tearing apart your broken vibrators that you already knew were broken." Then Jones says Buffington looked at both and "kind of hee-hawed around" and said, "Well, you've got me, the reason you were fired is because you were complaining about safety, and people above my head found out about it. And I had to let you go." Jones went on to say that he had heard "what I wanted to hear and I kind of turned and walked out." Immediately on cross-examination, Jones explained his last remark by saying "[Buffington] said that he fired us because we were complaining about safety and that's against the law and I planned on hanging his ass right here in court."

As noted previously, Buffington was called as an adverse witness by the General Counsel, who did not ask him about his version of the August 17 confrontation. Respondent did not choose to recall him during its case.[8]

The General Counsel argues that Buffington made admissions against interest to the above employees, which are undenied. Indeed, on a cold record it would appear that Respondent abandoned its obligation to defend. However, that would ignore considerations of demeanor and fervor which were apparent to me as I listened to the testimony. Certainly the testimony of Jones shows bias in its face, and it rang untrue. Likewise the testimony of Stedham and Pendergrass did not appear convincing with respect to its veracity on the question of whether or not Buffington referred to safety. Only Wells' initial testimony seemed to have an objective view of what occurred in that office. And, even after being cued Wells did not describe anything like Buffington's supposed admission as reported by the other three.[9] His testimony appears to me to be the closest to the truth. This is not to say that I am discrediting either Pendergrass or Stedham on the basis of deliberate prevarication, though that may have been the case: rather, it seems to me that they were excessively sensitive to the safety skip matter, were aware of the agreement not to work on August 15, and were ready to ascribe an evil motive to nearly anything negative which occurred. Jones is even worse than those two in this regard. He said that he "wanted to hear" an admission from Buffington; accordingly, he did. That Buffington ever uttered such an admission is most doubtful.

In analyzing both Stedham's and Pendergrass' testimony here, I note that both said Buffington remarked that there had been too much "commotion" about safety from the concrete crew. In themselves, the statements smack of improbability. The only "commotion" about safety was by the ironworkers over the safety skip on August 15.[10] The mud crew's August 15 decision not to work until the site was approved as safe raised no commotion either, and Buffington could not have been referring to that incident. In any case it was submerged by the fact that concrete could not have been placed until the forms were finished. Thus, I do not credit Stedham's and Pendergrass' testimony here.

Frankly, the only probable scenario is that the mud crew employees were discharged because of the results achieved on the August 15 pour, discovered on August 17. No one disagrees with Respondent's conclusion that the work was unacceptable. And, as it involved the structural integrity of a nuclear reactor cooling tower as well as the integrity of the base for the construction crane, the discharge of those who performed the work is not surprising. That is particularly so where Respondent

[8] The General Counsel did not question Alexander about this incident either; there is some testimony that Alexander was not present, but the record is not clear on the point. The General Counsel did not ask Steward Kissler about what occurred either. It may be that he did not hear the admission or he may have left before Stedham induced it. It may also be that it did not occur and he could not have honestly testified that it did.

[9] Wells' reference to the skip in his cued testimony is unlikely since that was an ironworker-raised matter, which Buffington was not likely to have placed at the feet of the mud crew.

[10] Steward Kissler's mild involvement in that issue had occurred weeks earlier and can only be considered remote.

is agreed to be generally responsive to safety issues, and the integrity of the plant and its principal construction tool—the crane—are put in question. In that context, I therefore discredit those versions based on both internal improbability as well as circumstantial improbability. It follows that the General Counsel's witnesses were inherently unreliable with respect to that issue and that therefore the General Counsel did not make out a *prima facie* case. In that circumstance, it was unnecessary for Respondent to have recalled Buffington for the purpose of making a specific denial.

I recognize that to some extent the poor concrete work was not the direct fault of the crew. Certainly the defective equipment contributed to the poor workmanship. Nonetheless, that deficiency on the part of management does not add anything to the General Counsel's allegation that they were fired for having expressed concern regarding safety practices. No doubt Respondent accepts its ultimate responsibility for the poor workmanship; in fact, Respondent took several steps to correct it. One of those steps, however, included discharging the entire crew. In view of the awful results achieved by the crew a blanket solution—i.e., getting rid of all involved—would not be an unlikely response. It is also true that the response was unfair to those who had not engaged in the vibrator work or to those who had used faulty equipment. Nonetheless, no law was violated with respect to it; indeed the unfairness was recognized a few weeks later when cooler heads prevailed during the Union's handling of the grievance. There the Union appears to have acknowledged that the crew had performed poorly and a certain amount of discipline was reasonable. Likewise, Respondent acknowledged that its discipline was too drastic and compromised by reinstating Kissler and permitting the Union to again refer the remainder of the crew for reemployment.

In conclusion I find that the General Counsel has failed to prove by credible evidence that Respondent discharged its concrete crew on August 17 because it believed the crew members had a propensity for engaging in safety matters.

Based on the foregoing findings of fact and the record as a whole, I hereby make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]